

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14th day of June, two thousand and seven.

PRESENT:

HON. AMALYA L. KEARSE,  
HON. CHESTER J. STRAUB,  
HON. ROSEMARY S. POOLER,  
*Circuit Judges.*

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IVY SILBERSTEIN d/b/a Ivy Supersonic,

*Plaintiff-Counter-Defendant-Appellant,*

**SUMMARY ORDER**

No. 04-4401-cv

v.

JOHN DOES 1-10, ALLPOSTERS.COM, INC.,  
HARPERCOLLINS PUBLISHERS, INC. and XYZ CORPORATIONS, 1 through 1500,

*Defendants-Appellees,*

FOX ENTERTAINMENT GROUP, INC., BLUE SKY STUDIOS, INC., TWENTIETH

CENTURY FOX FILM CORPORATION, JAKKS PACIFIC, INC., and UBI SOFT ENTERTAINMENT, INC.,

*Defendant-Counter-Claimant-Appellees.*

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MARK D. BELONGIA, Chicago, IL (Peter S. Cane, Cane & Associates, New York, NY, on the brief), *for Plaintiff-appellant.*

JONATHAN ZAVIN, Loeb & Loeb, LLP (Jacques M. Rimokh, *of counsel*), New York, NY, *for Defendants-appellees Fox Entertainment Group, Inc., Blue Sky Studios, Inc., Twentieth Century Fox Film Corporation, Jakks Pacific, Inc., Ubi Soft Entertainment, and HarperCollins Publishers, Inc.*

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AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

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Plaintiff-appellant Ivy Silberstein appeals from the judgment of the United States District Court for the Southern District of New York (Richard J. Holwell, *Judge*), entered on July 21, 2004, granting defendants' motion for summary judgment and dismissing her claims for copyright and trademark infringement. *Silberstein v. Fox Entm't Group, Inc.*, 424 F. Supp. 2d 616 (S.D.N.Y. 2004). We assume the parties' familiarity with the balance of the facts, procedural history, and issues on appeal.

"We review a district court's grant of summary judgment de novo." *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46 (2d Cir. 2007). "Summary judgment is warranted only upon a showing 'that there is no genuine issue as to any material fact and that the [prevailing] party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). "In assessing the record to determine whether there is such an issue, we view the evidence in the

light most favorable to the [losing] party, drawing all reasonable inferences and resolving all ambiguities in its favor . . . .” *Id.*

The District Court held, *inter alia*, that Silberstein failed to raise a genuine issue of material fact as to whether defendants unlawfully appropriated her work. *Silberstein*, 424 F. Supp. 2d at 629-32; *see generally Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (noting that plaintiff bears the burden of showing that defendant committed an “unlawful appropriation” of plaintiff’s work). We agree.

Unlawful appropriation requires the existence of substantial similarity between the defendant’s creation and the protectible aspects of the plaintiff’s own work. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001); *see also Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992). No reasonable jury could find that there was substantial similarity between defendants’ Scrat and the original, protectible elements of Silberstein’s Sqrat.<sup>1</sup>

We initially note that the two characters differ substantially with respect to almost every individual element, such as the shape of their bodies, heads, limbs, feet, hands, tail, and teeth, and the presence or absence of whiskers, eyebrows, and a navel. The two creations also differ markedly in terms of their “total concept and feel.” *Boisson*, 273 F.3d at 272 (internal quotation marks omitted). In the District Court’s apt description, Silberstein’s “Sqrat is a rather crudely drawn two-dimensional, monochromatic, static character,” whereas defendants’ “Skrat is portrayed as existing and moving in three dimensions, and his fur, nose, eyes, mouth, and extremities are rendered in lifelike detail and realistic color and shade.” *Silberstein*, 424 F. Supp.

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<sup>1</sup>In order to give Silberstein every benefit of the doubt, we assume without deciding that she fully owned the rights to the Beaver cartoon from which Sqrat was derived, and therefore do not address the District Court’s holding as to issue preclusion.

2d at 631. Moreover, while “Sqratt is a heavy-set figure that stands upright,” Sqratt is drawn with “long, lean lines and a hunched, conventionally rodent-like posture.” *Id.* In addition, Sqratt “is a caricature with an assemblage of rudimentary comic-strip features,” yet Sqratt, which is rendered in far more realistic and detailed fashion, does not possess a similar comic-strip or caricatured air. *Id.*

Any slight similarities, and they are few and far between, fall within the *scènes à faire* doctrine; exaggerated facial features, protruding eyes with small pupils, and an anthropomorphic aura are all standard for animal cartoon characters. *See generally MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004) (“Scenes a faire are unprotectible elements that follow naturally from a work’s theme rather than from an author’s creativity.”); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (noting examples of “scenes a faire,” including action figures of muscular superheroes in traditional fighting poses). Finally, we note that the expert declaration submitted by Silberstein, while relevant to the issue of actual copying, is ‘irrelevant when the issue turns to unlawful appropriation.’ *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975), *cited in Laureyssens*, 964 F.2d at 140.

Turning to the trademark infringement claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), we again agree with the District Court’s conclusion. The right to a mark exists only as “a right appurtenant to an established business or trade in connection with which the mark is employed.” *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1271 (2d Cir. 1974) (internal quotation marks omitted); *see also Buti v. Perosa, S.R.L.*, 139 F.3d 98, 103 (2d Cir. 1998). The District Court properly found that, despite Silberstein’s promotion of Sqratt, she never actually sold Sqratt products as a course of business. *See La*

*Societe Anonyme*, 495 F.2d at 1272 (explaining that a mark will not retain protection unless its commercial use has been “deliberate and continuous, not sporadic, casual or transitory”).

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk of Court

By: \_\_\_\_\_